Supreme Court, U.S.
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No. 04-1487

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY, DEPARTMENT OF LABOR,

Petitioner,

v.

RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to consider whether the Court of Appeals for the Third Circuit – like the Court of Appeals for the First Circuit – (the only two Circuit Courts to address the issue) correctly held that a non-profit corporation's obligation, under unemployment compensation law, to reimburse the State for unemployment benefits paid to the non-profit's former employees, based on services rendered prior to the non-profit's bankruptcy petition, was not a "tax" "on a transaction" entitled to bankruptcy priority pursuant to 11 U.S.C. § 507(a)(8)(E)?

STATEMENT UNDER SUP. CT. R. 29.6

The respondent in this matter, the Reconstituted Committee of Unsecured Creditors of United Healthcare System, Inc. ("Committee"), is not a corporation. Its members are (i) JNESO, District Counsel 1, IUOE, AFL-CIO, (ii) Horizon Blue Cross Blue Shield of New Jersey, and (iii) PSE&G.

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STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The following are in addition to the statutory provisions set forth in the Petition:

1. N.J.S.A. 43:21-7(c)(5). Contributions; Respondent's Appendix ("Resp. App.") 1a-4a.

2. S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-19; Resp. App. 5a-6a.

STATEMENT OF THE CASE

A. Background.

The principal facts in this matter are not in dispute. United Healthcare System, Inc. ("United") filed a petition for reorganization under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") on February 19, 1997 (the "Filing Date"). Pre-petition, United was a non-profit corporation which had been designated The Children's Hospital of New Jersey and provided hospital and healthcare services to Newark, Orange and Irvington, New Jersey. Within forty-eight (48) hours after United filed its bankruptcy petition, United ceased providing healthcare services and either discharged its patients to their homes or transferred them to other healthcare facilities. Three weeks later, on March 8, 1997, United terminated the bulk of its employees who then applied to the New Jersey Department of Labor ("DOL") for unemployment compensation benefits.

B. New Jersey's Unemployment Compensation Law.

Most New Jersey employers are contributory employers under New Jersey unemployment compensation law and are required to make unemployment, disability and healthcare tax payments to DOL on a quarterly basis calculated as a percentage of the wages paid by the employer to its employees. *See* N.J.S.A. 43:21-7; Appendix to Petition for a Writ of Certiorari ("Pet. App.") 72-79. As a non-profit corporation, however, United was entitled, in lieu of paying quarterly taxes to DOL, to elect to pay DOL solely a reimbursement charge for any unemployment benefits DOL ultimately paid to United's former employees (the "Reimbursement Obligation"). *See* N.J.S.A. 43:21-7.2; Pet. App. 79-86. United made such an election in 1972 and reimbursed DOL for unemployment benefits DOL paid to its former employees until United filed for bankruptcy protection in 1997.

C. DOL's Reimbursement Claims and the Committee's Objections.

DOL filed proofs of claims in United's bankruptcy case totaling $9,458,597.89 which arise primarily from the unemployment benefits DOL paid to United's former employees. Specifically, DOL filed an administrative claim totaling $8,302,427.84 consisting of (i) a "Reimbursement Obligation" of $6,240,640.36 and related interest of $1,982,520.58 for unemployment benefits DOL paid to United's former employees after the Filing Date and (ii) a "Contribution Claim" of $79,266.90 consisting of the quarterly tax levied against United as a contributory employer based on a percentage of the wages United paid to its employees on and after the Filing Date (the "Administrative

Claim").[1] Petition for a Writ of Certiorari ("Petition") at 5. DOL also filed a priority claim for a "Reimbursement Obligation" of $932,704.37 and related interest of $8,597.93 for unemployment benefits DOL paid to United's former employees prior to the Filing Date (the "Priority Claim"). Petition at 5.

The Committee's predecessor, the Official Committee of Unsecured Creditors of Creditors of United Healthcare Inc.,[2] objected to the Administrative Claim and the Priority Claim on various grounds as part of an omnibus claims objection motion. DOL opposed this objection and, following discovery, the parties submitted briefs, affidavits and deposition transcripts regarding the objections to the DOL claims. In a reported decision, the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") rejected some of DOL's arguments as to the priority of its claims, but accepted others. Pet. App. 38.

D. DOL's Claim for Administrative Priority Under 11 U.S.C. §§ 507(a)(1) and 503(b).

DOL claimed administrative priority under 11 U.S.C. §§ 507(a)(1) and 503(b) for the Reimbursement Obligation included in the Administrative Claim solely because DOL paid unemployment benefits to United's former employees

1. After United filed its bankruptcy petition, DOL no longer considered United a non-profit employer and required United to pay quarterly employment taxes based on a percentage of the wages United paid its employees. Petition at 5.

2. Following confirmation of United's plan of reorganization, the Committee was authorized to pursue these objections to the DOL's proofs of claim.

post-petition. The Bankruptcy Court rejected DOL's claim of administrative priority.

The Bankruptcy Court held that only taxes "incurred by the estate" post-petition can be classified as administrative claims under 11 U.S.C. § 503(b)(1)(B). Pet. App. 56. The Bankruptcy Court further concluded that "all of the employment on which the reimbursement charges are based occurred in the pre-petition period." Pet. App. 56.[3] Thus, the Bankruptcy Court held that the Reimbursement Obligation included in the Administrative Claim was not entitled to administrative priority because it was not "incurred post-petition" or based on a transaction with United as the debtor-in-possession. Neither United nor DOL challenged this holding on appeal.

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3. By statute, unemployment benefits are calculated upon a "base year" which consists of "the first four of the last five completed calendar quarters immediately preceding an individual's benefit year." N.J.S.A. 43:21-19(c)(1); Pet. App. 91. "Benefit year" with respect to an individual is defined as

> the 364 consecutive calendar days beginning with the day on, or as of, which he first files a valid claim for benefits, and thereafter beginning with the day on, or as of, which the individual next files a valid claim for benefits after the termination of his last preceding benefit year.

N.J.S.A. § 43:21-19(d); Pet. App. 93. As the Bankruptcy Court determined, since the bulk of United's employees were terminated on March 8, 1997 and applied for unemployment compensation on March 9, 1997, the "base year" for the vast majority of the former employees was the fourth quarter of 1995, and the first, second and third quarters of 1996, all of which occurred prior to the Filing Date. Pet. App. 41.

E. DOL's Claim for "Tax" Priority as an Employment Tax Under 11 U.S.C. § 507(a)(8)(D).

As a fallback to its claim of administrative priority, DOL also argued that the Reimbursement Obligation included in the Administrative Claim as well as the Reimbursement Obligation included in the Priority Claim (together, the "Reimbursement Claims") were entitled to priority as an employment tax on wages pursuant to 11 U.S.C. § 507(a)(8)(D). The Bankruptcy Court rejected this argument and determined that the Reimbursement Claims were not entitled to priority under Bankruptcy Code § 507(a)(8)(D) because the Reimbursement Claims were not a levy on the wages United paid to its employees:

> [T]he reimbursement charges sought by [DOL] are not entitled to priority under section 507(a)(8)(D) because they are not levied on wages, salaries, or commissions, but result instead from the amount of benefits paid to former employees under N.J.S.A. 43:21-7.2. The reimbursement charges are removed in time from the payment of wages, in that they are based on benefits paid only after unemployment occurs and the employee qualifies for benefits. There is no immediate connection between the wage earned and the benefits paid. To grant priority to the DOL's reimbursement claim as an employment tax would serve to expand the narrowly defined priority given to employment taxes under the Code.

Pet. App. 54-55. Neither United nor DOL challenged this holding on appeal.

F. DOL's Claim for "Tax" Priority as an Excise Tax Under 11 U.S.C. § 507(a)(8)(E).

Alternatively, DOL argued that the Reimbursement Claims were entitled to priority as an "excise tax on . . . a transaction occurring during the three years immediately preceding the date of the filing of the petition . . ." pursuant to 11 U.S.C. § 507(a)(8)(E).[4] The Bankruptcy Court ultimately accepted this argument by DOL. Pet. App. 54. The Committee appealed this holding of the Bankruptcy Court to the United States District Court for the District of New Jersey (the "District Court") which affirmed without an opinion in an unpublished order. The Committee then appealed the decision of the District Court to the Third Circuit, which reversed the District Court Order. (Pet. App. 1.) It is this decision as to which DOL petitions for certiorari before this Court.

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4. Section 507(a)(8)(E) specifically provides:

> The following expenses and claims have priority in the following order: . . . (8) Eighth, allowed claims of governmental units, only to the extent, that such claims are for . . . (E) an excise tax on - (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or (ii) if a return is not required, ***a transaction occurring during the three years immediately preceding the date of the filing of the petition.***

11 U.S.C. § 507(a)(8)(E) (emphasis added); Pet. App. 58-59.

G. The Third Circuit's Decision.

The Third Circuit held that the Reimbursement Obligation was not a tax. Pet. App. 19, 24. Following this Court's directive in *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213 (1996), the Third Circuit undertook a "functional examination" of the Reimbursement Obligation. Pet. App. 19, 24. The Third Circuit determined that the Reimbursement Obligation was distinct from the unemployment tax on wages paid by contributory employers. Pet. App. 20, 22, 23. Because the Reimbursement Obligation only repaid DOL for unemployment benefits DOL paid to United's former employees and was not a levy assessed on United to support the general costs of New Jersey's unemployment compensation system, the Third Circuit, like the First Circuit before it, concluded that the Reimbursement Obligation did not operate as a "tax," Pet. App. 19, 24, and, thus, was not entitled to priority under Bankruptcy Code § 507(a)(8)(E). Pet. App. 24.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS JUSTIFYING THE PETITION.

Sup. Ct. R. 10 states that "a writ of certiorari will be granted only for compelling reasons." A principal "compelling reason" is "whether a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Sup. Ct. R. 10(a).[5]

5. A circuit split exists only where federal courts of appeals have arrived at contrary holdings. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 n.2 (2002) (resolving "a ***split*** among the Courts of Appeals concerning the proper pleading standard for (Cont'd)

DOL cannot show any conflict between the only two United States courts of appeal to address the bankruptcy priority of reimbursement obligations under the unemployment compensation laws. Both the Third Circuit in this case and the United States Court of Appeals for the First Circuit in *Massachusetts Division of Employment & Training v. Boston Regional Medical Center, Inc. (In re Boston Regional Medical Center, Inc.)*, 291 F.3d 111 (1st Cir. 2002) ("*Boston Regional I*") reached the same conclusion: that a non-profit employer's Reimbursement Obligation is not a tax.

A. The Third Circuit and the First Circuit Both Determined that a Non-Profit Employer's Reimbursement Obligation is not a "Tax".

The Third Circuit decided that United's Reimbursement Obligation under New Jersey's unemployment compensation law was not a tax for bankruptcy purposes. Pet. App. 19, 24. The United States Court of Appeals for the First Circuit, the only other federal circuit court to consider this issue, reached exactly the same result when it addressed whether a non-profit hospital's Reimbursement Obligation under

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(Cont'd)
employment discrimination cases" wherein a "majority of Courts of Appeals have ***held*** that a plaintiff need not plead a prima facie case of discrimination . . ." yet the Second Circuit "***held*** that the petitioner had failed to meet his burden because his allegations were insufficient as a matter of law to raise an inference of discrimination") (emphasis added); *United States v. Texas*, 507 U.S. 529, 533 n.3 (1993) (acknowledging "a ***split*** among the Courts of Appeals" wherein "[t]he Tenth Circuit ***holds*** that the Debt Collection Act of 1982 did not abrogate the Federal Government's common-law right to collect prejudgment interest against the States" while "[t]he Second, Third, and Eighth Circuits all ***hold*** to the contrary") (emphasis added).

Massachusetts unemployment compensation law was a tax for bankruptcy purposes. *Boston Regional I*, 291 F.3d at 124.

Like New Jersey's unemployment compensation law, Massachusetts' unemployment compensation law was dictated by the Federal-State Unemployment Tax Act, codified at 26 U.S.C. § 3301 *et seq.* ("FUTA"). As required by FUTA, the Massachusetts statute provided non-profit employers with the option to opt out of the contributory tax on wages and to elect solely to reimburse the state for any unemployment benefits it actually paid to the non-profit's employees. *Boston Regional I*, 291 F.3d at 115 ("Nonprofit employers have the option instead to make 'payments in lieu of contributions,' reimbursing the fund after the fact for benefits paid to their former employees.") (citing Mass. Gen. Laws. Ch. 151A, § 14A).

After undertaking the "functional examination" required by *CF&I*, the First Circuit concluded that this Reimbursement Obligation was not a tax:

> [W]e must examine the functions of the law that imposes the obligations rather than the label given the obligation. . . .
>
> * * *
>
> We hold that payments in lieu are not taxes within the meaning of § 507(a)(8).

Boston Regional I, 291 F.3d at 120, 124 (internal citations omitted).

The Third Circuit undertook the same functional examination and reached the same result:

> After making an independent analysis predicated on a functional examination such as that applied in *CF&I Fabricators*, we have determined that United's obligation to reimburse [DOL] for unemployment compensation benefits is not a tax for bankruptcy purposes.

Pet. App. 19.

B. DOL's Reliance on Federal Circuit Court Decisions Involving Statutes, Other than Unemployment Compensation Statutes, is Misplaced and Misleading.

In a futile attempt to avoid the unity between the First Circuit and the Third Circuit decisions, which are the only two courts to address whether the Reimbursement Obligation was a tax, DOL spends considerable time discussing decisions which involve payment obligations not under any unemployment compensation statute, but under different statutory schemes such as: (i) workers' compensation statutes, *Ohio Board of Workers Compensation v. Yoder (In re Suburban Motor Freight, Inc.)*, 36 F.3d 484 (6th Cir. 1994) ("*Suburban II*"), *Industrial Commission v. Camilli (In re Camilli)*, 94 F.3d 1330 (9th Cir. 1996), and *George v. Uninsured Employers Fund (In re George)*, 361 F.3d 1157 (9th Cir. 2004), (ii) "charity care" statutes, *In re Boston Regional Medical Center, Inc. v. Massachusetts Division of Health Care Finance & Policy (In re Boston Regional Medical Center, Inc.)*, 365 F.3d 51 (1st Cir. 2004) ("*Boston Regional II*"), and (iii) sewer use statutes, *County Sanitation*

District No. 2 v. Lorber Industries (In re Lorber Industries), 675 F.2d 1062 (9th Cir. 1982). Since these decisions involve wholly-different statutes and schemes of compensation, they fail to demonstrate any split among the circuits as to whether the Reimbursement Obligation under the unemployment compensation law is a tax entitled to priority treatment under the Bankruptcy Code.

1. Workers' Compensation Statutes

Suburban II, *Camilli* and *George* involved workers' compensation statutes. These statutes permitted employers to pay state premiums, self-insure or provide insurance to cover their workers' compensation claims. *Suburban II*, 36 F.3d at 486; *Camilli*, 94 F.3d at 1332; *George*, 361 F.3d at 1159. They further required the state to pay the injured worker if the employer failed to do so. In each case, the employer failed to insure, self-insure and/or pay the employee, so the state paid the claims and sought reimbursement from the defaulting employer. *Suburban II*, 36 F.3d at 486; *Camilli*, 94 F.3d at 1332; *George*, 361 F.3d at 1159. Because these cases do not involve the unemployment compensation statutes in issue here, they do not conflict with the decisions of the First and Third Circuits in determining that the Reimbursement Obligation is not a tax.[6]

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6. Even if these workers' compensation reimbursement cases were sufficiently analogous to the Reimbursement Obligation in the unemployment compensation statutes at issue here and in *Boston Regional I*, they demonstrate no split in the circuits. Like the Third Circuit here and the First Circuit in *Boston Regional I*, the Sixth Circuit in *Suburban II* concluded that the reimbursement obligation under the workers' compensation law was ***not a tax***. *Suburban II*, 36 F.3d at 489. The Ninth Circuit reached the same conclusion in *George*. *George*, 361 F.3d at 1162. Only the Ninth Circuit's earlier decision in *Camilli* reached a different result. *Camilli*, 94 F.3d at 1334.

2. Other Statutes.

a. Charity Care Statute.

Boston Regional II and *Lorber* involved even more distinct payment obligations. *Boston Regional II* involved a statute which assessed charges to equalize the disproportionate burden of providing "charity" emergency room care to indigent patients between hospitals located in poor urban areas and hospitals in less economically-distressed areas. *Boston Regional II*, 365 F.3d at 53. In *Boston Regional II*, the First Circuit found the "charity care" obligation under this statute was a tax. *Boston Regional II*, 365 F.3d at 63.

b. Sewer Use Statutes.

Lorber involved fees which a municipality imposed on its residents for the use of the municipal sewer system. *Lorber*, 675 F.2d at 1064-65. *Lorber* found the sewer charges not to be a tax because they conferred a direct benefit on the parties obligated to pay the charges. *Lorber*, 675 F.2d at 1067.

Because the Third Circuit's decision is consistent with the only other circuit court to actually address the Reimbursement Obligation within the context of an unemployment compensation statute, and because the other cases cited by DOL did not involve a Reimbursement Obligation under FUTA or any State unemployment compensation statute, there is no foundation to conclude that there is a split among the Federal circuits' holdings on this issue or to grant the Petition on this basis.

II. THE THIRD CIRCUIT DID NOT DEPART FROM THIS COURT'S PRECEDENT, RATHER IT PROPERLY APPLIED THE "FUNCTIONAL EXAMINATION" THAT THIS COURT ESTABLISHED IN *CF&I*, IN DETERMINING THAT THE REIMBURSEMENT OBLIGATION WAS NOT A TAX.

DOL has also failed to establish that "a United States court of appeals has decided an important question in a way which conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Third Circuit's decision does not conflict with a decision of this Court. To the contrary, the Third Circuit's functional examination is wholly consistent with, and in furtherance of, this Court's most recent decision on "what is a tax". *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213, 224-26 (1996).

A. This Court's Precedent Mandates a Functional Examination to Determine if an Obligation is a Tax Entitled to Priority under the Bankruptcy Code.

In *CF&I*, this Court prescribed a "functional examination" to determine if an obligation is a tax:

> On a number of occasions, this Court considered whether a particular exaction, whether or not called a "tax" in the statute creating it, was a tax for purpose of § 64(a) [the predecessor to 11 U.S.C. § 507(a)(8) in the Bankruptcy Act], and in every one of those cases the Court looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question.
>
> * * *

> [W]e conclude that the 1978 Act reveals no congressional intent to reject generally the interpretive principle that characterizations in the [relevant statute] are not dispositive . . . , and no specific provision that would relieve us from making a functional examination of [the statute in issue].

CF&I, 518 U.S. at 220, 224.

In performing this examination, the Court in *CF&I* first examined the language of the statute, 26 U.S.C. § 4971 (§ 4971), to ascertain the characteristics of the charge in issue. *CF&I*, 518 U.S. at 224. After focusing on the statutory language and case law interpreting § 4971, *CF&I* also examined the statute's legislative history and concluded that all three sources demonstrated the punitive, non-tax nature of the charge. *Id.* at 226 (citing H.R. Rep. No. 93-807, at 28 (1974)).

Based on this functional examination, *CF&I* concluded that the applicable provision was a penalty and not a tax:

> [g]iven the patently punitive function of § 4971, . . . § 4971 must be treated as imposing a penalty, not authorizing a tax. Accordingly, we hold that the 'tax' under § 4971(a) was not entitled to seventh priority as an 'excise tax' under § 507(a)(7)(E), but instead is, for bankruptcy purposes, a penalty to be dealt with as an ordinary, unsecured claim.

Id.

B. As Directed by *CF&I*, the Third Circuit Performed a Functional Examination of United's Reimbursement Obligation to Determine if it Constituted a Tax under New Jersey's Unemployment Compensation Statute.

Following the procedure dictated by the Supreme Court in *CF&I*, the Third Circuit made an independent analysis to determine whether the Reimbursement Obligation was a tax. Pet. App. 19.

The Third Circuit began by reviewing the statutory scheme which, in this case, includes both FUTA and the provisions of New Jersey law implementing FUTA. It also confirmed the purpose of the statute's provisions as explicated in the applicable legislative history. It then determined that the Reimbursement Obligation did not function as a tax.

The Third Circuit noted that the New Jersey statute giving rise to United's obligation allowed United to elect, in lieu of paying a contributory tax on wages, "to reimburse [DOL] for any unemployment compensation benefits [DOL] actually paid to former United employees." Pet. App. 5 (citing N.J.S.A. 43:21-7.2). The Third Circuit noted that this was consistent with FUTA which exempted nonprofit employers from paying federal contributory taxes on wages. Pet. App. 6 (citing 26 U.S.C. § 3306(c)(8)). The Third Circuit also confirmed that this was consistent with the legislative history underlying both FUTA and the New Jersey act conforming New Jersey law to FUTA's 1970 amendments. Both the express language of the statute and the legislative history interpreting it allowed a non-profit employer to opt out from the contributory tax on wages so that it could insulate itself

from the general costs of providing unemployment benefits to all employees in the unemployment compensation system. Pet. App. 21. *Accord* S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18; Resp. App. 5a-6a.[7]

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7. The Senate Report on the 1970 amendment noted the desire both (a) to avoid taxing non-profit employers and (b) to exclude non-profit employers from subsidizing unemployment benefits provided to employees in the for-profit sector:

> Under existing Federal law, services performed for non-profit religious, charitable, educational and humane organizations and for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. There has not, therefore, been a tax-credit incentive for covering employees of these organizations and governments for unemployment compensation purposes. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in non-professional occupations.
>
> ***The committee does not want to change the present tax status of non-profit organizations***, but is concerned about the need of their employees for protection against wage loss resulting from unemployment.
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> * * *
>
> ***The States would be required also to provide non-profit organizations with the option of reimbursing the State*** for unemployment compensation payments attributable to service with the organization ***in lieu of paying contributions under the normal tax provisions of the State law***. In effect, the non-profit organizations would be allowed to adopt a form of self-insurance. Under the reimbursement method of financing, a non-profit organization whose workers

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The Third Circuit emphasized that United's Reimbursement Obligation was distinct from the contributory taxes which all for-profit employers pay as a percentage of their payrolls. Pet. App. 20 (noting that "New Jersey law . . . except[s] non-profit employers . . . from the contribution obligation section 43:21-7.2 creates.").

In determining the function of the Reimbursement Obligation, the Third Circuit noted that a tax was a charge assessed to generally fund the costs of providing a governmental program, like the unemployment compensation system. Pet. App. 9 (citing *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906)) & 21. But the Third Circuit emphasized that "[o]ne major characteristic of the reimbursement obligation is that payments in lieu of contributions reimburse DOL for unemployment benefits actually paid and do not raise funds to support a general governmental undertaking." Pet. App. 21.[8] This led the Third Circuit to conclude that "rather than a tax,

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> experienced no compensated unemployment in a year would have no unemployment insurance costs for that year. ***The committee considers it appropriate that these organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises.***

S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18; Resp. App. 5a-6a. (emphasis added).

8. DOL concedes in its Petition that the Reimbursement Obligation did not contribute to the administrative costs or the solvency of New Jersey's unemployment compensation system. Petition at 4 (citing N.J.S.A. 43:21-7(e); 43:21-48). *Accord* N.J.S.A. 43:21-7(c)(5); Resp. App. 1a-4a.

the reimbursement obligation is more like a promise in exchange for [a] privilege. . . ." Pet. App. 22.

The Third Circuit also applied this Court's decision in *National Cable Television Association v. United States*, 415 U.S. 336 (1974). Although decided before *CF&I*, this case similarly employed a functional examination to determine whether the charge was a tax. *Nat'l Cable*, 415 U.S. at 341-42. *National Cable*'s functional examination explored the extent that the obligation was related to a benefit the government provided to the person paying the assessed charge and the extent that the government could manipulate the assessment. Pet. App. 23 (citing *Nat'l Cable*, 415 U.S. at 340-41).

In summary, the Third Circuit found that the Reimbursement Obligation was not a tax because (i) "the reimbursement obligation directly is linked to the benefits paid"; (ii) "the State cannot manipulate a reimbursement obligation to encourage or discourage certain activity"; and (iii) "the government pays out benefits and the non-profit employer simply refills the government coffers." Pet. App. 23.

Because the Third Circuit properly applied the functional examination directed by this Court, there is no basis for granting the Petition.

III. THIS CASE INVOLVES NO IMPORTANT, UNRESOLVED FEDERAL QUESTION WHICH THIS COURT SHOULD ADDRESS.

The Third Circuit did not address "an important question of Federal law that has not been, but should be, decided by this Court" which could provide a "compelling reasons" to grant DOL's Petition. Sup. Ct. R. 10(c). The question of "what is a tax?" has repeatedly been addressed by this Court. Beyond this,

the FUTA statute clearly mandates that the States allow non-profit employers to opt out of the contributory tax on wages and to elect a reimbursement obligation in lieu of the contributory tax. The clarity of this statutory scheme needs no further illumination from this Court. Further, this issue arises in limited factual circumstances only after an electing non-profit corporation files for bankruptcy and the Third Circuit's ruling is consistent with the necessarily-narrow construction of bankruptcy statutes to restrict priority treatment of claims in bankruptcy cases. Finally, DOL overstates the impact of the Third Circuit's ruling on its monetary recovery in this case and under the Bankruptcy Code in general.

A. This Court Has Already Explained How to Determine What is a Tax.

The broad issue which DOL presents to this Court, "what is a tax?", already has been addressed by this Court in *CF&I* and numerous cases preceding it. *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213 (1996); *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *City of New York v. Feiring*, 313 U.S. 283 (1941); *New Jersey v. Anderson*, 203 U.S. 483 (1906). In *CF&I*, this Court laid out the "functional examination" applied by the Third Circuit. The Third Circuit and the First Circuit recently harmonized *CF&I* with the decisions of other circuit courts in *Lorber* and *Suburban II* by construing the factors enumerated there as elements to consider in performing *CF&I*'s functional examination.[9] Pet. App. 14-15; *Boston*

9. Significantly, both *Lorber* and *Suburban II*, which DOL claims is the well-spring of the confusion it asks this Court to resolve, were decided before this Court's decision in *CF&I*. Since *CF&I* did not disavow the analysis in these cases, there is no basis to revisit *Lorber* and *Suburban II* now.

Regional I, 291 F.3d at 121 n.10. The federal circuit courts have readily applied these factors in determining the function of various obligations and this application does not require further explication by this Court.

B. The Decisions of the First and Third Circuits are in Accord with FUTA.

The FUTA scheme expressly mandates the States to provide non-profit employers with the election to pay a reimbursement obligation in lieu of the contributory tax on wages. 26 U.S.C. § 3309; Pet. App. 64-65. *Accord* S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18; Resp. App. 5a-6a; N.J. Laws of 1971, Chapter 346, Bill No. A2501 at 47-48; Pet. App. 97. It is not this Court's role (or the role of any court) to second-guess the clearly-expressed intent of the legislature. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When the statute's language is plain, the sole function of the Court . . . is to enforce it according to its terms."). *Accord Conn. Nat'l Bank v. Germain*, 502 U.S. 249, 253-54 (1992).

Additionally, the Third Circuit's decision is not only consistent with FUTA, it is also consistent with another important Federal policy expressed in the Bankruptcy Code, which requires priorities in bankruptcy to be narrowly construed. *See Suburban II*, 36 F.3d at 487 ("'[e]quality of distribution among creditors is a central policy of the Bankruptcy Code'. . . . Thus, priority claims must be carefully limited since every such claim reduces the fund available to general creditors.") (citations omitted). *Accord In re Metro Transp. Co.*, 117 B.R. 143, 154 (Bankr. E.D. Pa. 1990) ("[T]here is a presumption in bankruptcy cases . . . that the debtor's limited resources will be equally distributed among his creditors [causing] statutory priorities [to be] narrowly construed.").

C. The Third Circuit's Decision does not Threaten to Undermine New Jersey's Unemployment Compensation System

DOL's own Petition contradicts its extensive argument that the solvency of New Jersey's unemployment compensation system is threatened by the Third Circuit's decision. (Petition at 21-24). DOL admits that only contributory employers are obligated to pay for the administration and solvency of the system. Petition at 4 (citing N.J.S.A. 43:21-7(e) and 43:21-48). *Cf.* N.J.S.A. 43:21-7(c)(5); Resp. App. 1a-4a. (protecting the solvency of the system through the rates paid by contributory employees as a percentage of wages). Since non-profit employers only reimburse DOL for benefits actually paid to their own employees, these payments are not designed to support the administration or solvency of the unemployment compensation system.[10]

DOL further overstates the precedential impact of the Third Circuit's decision. It involved only a narrow element (a reimbursement obligation vs. a contributory tax on wages) of a broader system (unemployment compensation law) in the context of a bankruptcy case. As a result, it only applies to electing non-profit employers in the bankruptcy system; it applies only if the electing non-profit employer terminates employees just prior to or just after the electing non-profit employer files for bankruptcy protection; and it only applies in determining whether the claim will be treated as a priority

10. Nor should they. An important element of the FUTA legislative scheme is that non-profit employers do not cover the losses of contributory employers in the for-profit sector. *Accord* S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3618; Resp. App. 5a-6a. (quoted in n.7 *supra*).

versus general unsecured claim in the bankruptcy case. This narrow situation of limited circumstances is not sufficient to justify this Court exercising its jurisdiction here.

Finally, DOL also overstates the financial impact of the Third Circuit's decision on it. Just because United's Reimbursement Obligation did not garner priority treatment in United's bankruptcy case, does not mean that DOL's Reimbursement Claims will not be paid. Rather, consistent with the Federal policy of equality of distributions to creditors and the resulting, narrow construction of priority claims, the Reimbursement Claims will be treated as general unsecured claims in United's bankruptcy case and will be treated like all other non-priority creditors.

In this case, contrary to DOL's assertion in the Petition, DOL will not lose its entire claim. Rather, it will retain a general unsecured claim of over $7,000,000.[11] United's general unsecured creditors have already received a partial distribution of fifteen percent (15%), which the DOL will similarly receive, and are slated for an additional distribution upon final resolution of the DOL's claim. If the Third Circuit's decision stands, unsecured creditors, including DOL, will receive an additional distribution of approximately twenty percent (20%) for a total recovery of almost thirty-five percent (35%) of their unsecured claims.

Under these circumstances, there is no important and unresolved Federal question which this Court should address.

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11. The Committee has reserved the right to challenge the mathematical accuracy of DOL's calculation of its claim, but the parties agreed to defer this issue until the priority status of the claim finally has been resolved.

IV. DOL DOES NOT EVEN ARGUE THAT ANY OF THE OTHER ENUMERATED REASONS FOR GRANTING A PETITION FOR CERTIORARI ARE PERSENT HERE.

DOL has not raised any other grounds for granting its petition for certiorari and, in fact, none apply. The Third Circuit's decision does not conflict with a decision by a state court of last resort. Sup. Ct. R. 10(a). The Third Circuit has not departed from the accepted and usual course of proceedings or sanctioned such a departure by a lower court. Sup. Ct. R. 10(a). To the contrary, the Third Circuit simply disagreed with the lower courts' legal conclusions.

CONCLUSION

DOL's Petition for a Writ of Certiorari should be denied because: (1) there is no split between the Third Circuit's decision and any other circuit court decision; (2) the Third Circuit's decision is consistent with, and properly applied, the applicable decisions of this Court; (3) the Third Circuit's decision involves no compelling question which is unresolved by this Court; and (4) there is no other ground for granting the Petition.

Respectfully submitted,

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